

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DONALD COLE BURCHETT,

Plaintiff,

v.

ROBERT BROMPS, et al.,

Defendants.

NO. CV-07-00346-JLQ

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT and
DIRECTING ENTRY OF
JUDGMENT OF DISMISSAL
WITH PREJUDICE**

BEFORE THE COURT is the Defendant's Motion for Summary Judgment (Ct. Rec. 48), to which the *pro se* Plaintiff has responded in opposition (Ct. 60). The motion was heard without oral argument on November 20, 2008.

I. Statement of Facts

A. Procedural History

The Plaintiff, a *pro se* litigant, is in the custody of the state of Washington on various sexual offender charges and violations. He filed his Complaint under 42 U.S.C. § 1983 on October 29, 2007. Ct. Rec. 1. Jurisdiction before this court is proper as a federal question is presented, pursuant to 28 U.S.C. § 1331. The Defendants filed their answer, with jury demand, on March 12, 2008. Ct. Rec. 23. The Plaintiff filed a Motion to Withdraw Complaint (Ct. Rec. 41), but the court denied the motion as moot in light of later filings by the Plaintiff (Ct. Rec. 58).

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2 B. Factual Background

3 At the time of the filing of his complaint, the Plaintiff, Donald Cole Burchett
4 ("Burchett"), was incarcerated at the Spokane County Jail, awaiting trial on the charge of
5 failing to register as a sex offender. Mr. Burchett has been previously convicted of and
6 sentenced to 70 months incarceration for Second Degree Assault with sexual motivation
7 and Second Degree Kidnaping, based upon the sexual assault of two prepubescent
8 children. The crimes for which he was convicted took place at a church, though Mr.
9 Burchett denies this, along with his actual guilt. However, the sexual assault conviction
10 is a matter of record.

11 Mr. Burchett was released on community supervision from his 70 month sentence
12 on May 26, 2006. Conditions of his release, of which he was aware, provided that Mr.
13 Burchett could not initiate or prolong physical contact with any children, enter any
14 places where minors congregate without permission, or have any contact with the victims
15 or any other minor-age children. Upon release, Mr. Burchett was placed on community
16 placement/custody under the supervision of Community Corrections Officer Bob
17 Bromps ("Bromps"). Defendant Todd Wiggs ("Wiggs") is Mr. Bromps' supervisor.

18 Mr. Burchett began attending church after he was released, first at Spokane Valley
19 Open Bible Church, later at South Hill Seventh Day Adventist Church. There were
20 children present at both of these churches. Mr. Burchett did not ask Mr. Bromps for
21 permission to attend either church, nor did he inform leaders at either church that he was
22 a convicted sex offender. Pastor John Solomon of the Seventh Day Adventist Church
23 contacted Mr. Bromps on January 17, 2007, and informed him that Mr. Burchett had
24 been harassing a female member of the congregation, had failed to disclose his sex
25 offender status, and had lied to various church leaders. The next day, Mr. Bromps met
26 with Mr. Burchett, and Mr. Burchett signed a stipulated Agreement in which he admitted
27 to violating the conditions of his release by "frequenting a place where minors are known
28 to congregate." Two specific restrictions were imposed on Mr. Burchett. First, he could
not contact Associate Pastor Carol Corbin without her explicit permission as provided to

1 Mr. Bromps; and second, that he could not go within three city blocks of a church
2 without the permission of Mr. Bromps. Mr. Wiggs was not present for the signing of
3 this stipulated Agreement on January 18,2007.

4 On February 21, 2007, Mr. Bromps was called by a detective with the Spokane
5 County Sheriff's office. The detective informed Mr. Bromps of a phone call he had
6 received from Pastor Dale Miller of Spokane Valley Open Bible Church. Pastor Miller
7 stated that he had seen Mr. Burchett on the news the night before in a piece identifying
8 him as a Level III sex offender. Pastor Miller recognized Mr. Burchett from recent
9 church services. Mr. Burchett had attended services several times since his last meeting
10 with Mr. Bromps and his signing of the Agreement. Burchett had also allegedly told
11 several members of the church that he had just had knee surgery and that his brother was
12 a recent casualty of war in order to curry favor and cause monetary charitable giving
13 from the congregation. These representations by Burchett, if made, were clear
14 falsehoods. Mr. Bromps gave Mr. Burchett a verbal reprimand the next day, February 22,
15 2008. Mr. Bromps received further information that Mr. Burchett continued to attend
16 church services. Though no date is specified, Mr. Burchett alleges that Mr. Bromps
17 withheld permission for him to attend church with a friend for no reason, and that Mr.
18 Bromps would only allow him to attend an Assembly of God church. It is this alleged
19 action by Bromps and the Agreement signed by Burchett that is the basis for this action.

20 II. Standard of Review

21 Summary judgment is appropriate only when there "is no genuine issue as to any
22 material fact and...the moving party is entitled to judgment as a matter of law." Fed. R.
23 Civ. P. 56(c). A genuine issue of material fact exists when there is "sufficient evidence
24 favoring the non-moving party for a jury to return a verdict for that party." *Anderson v.*
25 *Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986). The moving party bears the initial
26 responsibility of informing the court of the basis for its motion and identifying those
27 portions of the record that establish the absence of a genuine issue of material fact.
28 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its

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2 burden, the non-moving party must go beyond the pleadings and come forward with
3 specific facts to demonstrate that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).
4 The non-movant must, however, do more than show that there is some abstract doubt as
5 to the material facts. He must present significant probative evidence in support of his
6 opposition to the motion for summary judgment in order to defeat the motion for
summary judgment. *Anderson*, 477 U.S. at 248.

7 III. Discussion

8 The Defendants argue that summary judgment on the Plaintiff's § 1983 civil rights
9 complaint is appropriate on four grounds: the Plaintiff's constitutional right to freely
10 exercise his religion was not infringed; the Defendants are entitled to quasi-judicial
11 immunity; Defendant Wiggs was a non-participant; and the Defendants are entitled to
12 qualified immunity.

13 "To establish a § 1983 claim, a plaintiff must show that an individual acting under
14 the color of state law deprived him of a right, privilege, or immunity protected by the
15 United States Constitution or federal law." *Levine v. City of Alameda*, 525 F.3d 903, 905
16 (9th Cir. 2008). The Free Exercise Clause of the First Amendment "withdraws from
17 legislative power, state and federal, the exertion of any restraint on the exercise of
18 religion." *Abington School Dist. v. Schempp*, 374 U.S. 203, 222-23 (1963). A free
19 exercise inquiry "asks whether government has placed so substantial a burden on the
20 observation of a central religious belief or practice and, if so, whether a compelling
21 government interest justifies the burden." *Hernandez v. Commissioner*, 490 U.S. 680,
22 699 (1989).

23 The basis of Mr. Burchett's civil rights complaint is the stipulated Agreement he
24 signed at the behest of Mr. Bromps (Ct. Rec. 54, Attachment B) as a result of his
25 admitted violation of his Community Placement/Custody conditions (Ct. Rec. 51, App. 1,
26 Ex. H). Mr. Burchett contends that the stipulated Agreement "...told me that I could not
27 go to church. This violates my right to practice free religion." (Ct. Rec. 1, p. 3.)As
28 argued by Burchett the state may not impose restrictions on the ability of an ordinary and

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unsupervised person from attending church. However, Mr. Burchett is a convicted sex offender felon on community supervision. (Ct. Rec. 51, App. 1.) As such, he does not enjoy the same level of freedom accorded others in our society who have refrained from breaking its laws.

We begin our resolution of the issue by taking note of the well-established principle that parolees and other conditional releasees are not entitled to the full panoply of rights and protections possessed by the general public. Quite to the contrary, the Court has recognized that 'those who have suffered a lawful conviction' are properly subject to a 'broad range of [restrictions] that might infringe constitutional rights in free society,' in no small part due to the extraordinary rate of recidivism among offenders...These restrictions generally 'are meant to assure that the [conditional release term] serves as a period of genuine rehabilitation and that the community is not harmed by the [releasee]'s being at large.' *U.S. v. Kincade*, 379 F.3d 813, 833-34 (9th Cir. 2004).

Although Mr. Burchett is not necessarily entitled to the same level of constitutional rights as the rest of the citizenry, claims of civil rights violations are not completely closed to him. A free exercise claim "asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Swaggart Ministries v. Cal. Bd. of Equalization*, 493 U.S. 378, 384 (1990). In order to reach the level of a constitutional violation, the interference "...must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine." *Graham v. C.I.R.*, 822 F.2d 844, 851 (9th Cir. 1987).

The limitation placed on Mr. Burchett by the stipulated Agreement did not represent a substantial burden on the observation of a central religious belief or practice, and cannot be considered anything more than an inconvenience. Mr. Burchett could still attend church if he so desired; he merely had to seek permission before doing so. Mr. Burchett does allege that he was denied permission to attend church at some undetermined and unspecified time (Ct. Rec. 60, p. 2), but the record does not set forth the specifics of any claim. The basis of his Complaint is a challenge to the validity of the stipulated Agreement itself. It is not a claim based on a specific incident or denial of permission. (Ct. Rec. 1, p. 3.)

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2 The government has a compelling interest in making sure the community is
3 protected from pedophile sex offenders. In this case, a church had complained of Mr.
4 Burchett harassing its members (Ct. Rec. 41, Attachment A), and Mr. Burchett's prior
5 crime of conviction took place in a church (Ct. Rec. 54, ¶ 4). A church is a place where
6 children are often found, be they attending services or in a nursery, and keeping Mr.
7 Burchett away from minors is clearly a valid and appropriate objective behind the
8 conditions of his supervision. (Ct. Rec. 51, Ex. 1, App. H.) Mr. Burchett admitted to
9 violating the conditions of his supervised release by going to a place he knew minors
10 would congregate. (Ct. Rec. 54, Attachment B.) Based on this admission, the
11 government had a compelling interest in limiting the danger to the public presented by
12 Mr. Burchett. Mr. Burchett was classified as a Level III Sex Offender, a level reserved
13 for those offenders considered to be the highest risk and likeliest to re-offend. (Ct. Rec.
14 51, Ex. 1.)

15 The District of Oregon persuasively concluded that a parole condition nearly
16 identical to the one at issue in Mr. Burchett's stipulated Agreement was properly
17 interpreted by the Oregon Parole Board as not infringing on the parolee's First
18 Amendment right to free exercise. That court recognized that an absolute prohibition
19 against attending church could infringe the right to free exercise, but such a blanket
20 prohibition is not present in this case. See *Hunter v. Trautwein*, 2006 WL 3463441, 7-8
21 (D.Or. 2006). The stipulated Agreement signed by Mr. Burchett only prohibited him
22 from being within three city blocks of a church "*without the permission of the*
23 *supervising CCO* (emphasis added)." (Ct. Rec. 54, Attachment B.)

24 Even without evaluating Mr. Burchett's complaint under the less rigorous standard
25 by which the claims of infringement of constitutional rights of convicted felons and
26 supervised releasees are judged, this court concludes that no inappropriate burden was
27 placed on Mr. Burchett's right to freely exercise his religion. Even if the burden were
28 substantial, there existed a compelling government interest in keeping a Level III sex
offender, one who had admitted to violating the conditions of his release, away from

1 children, an environment similar to that of his past conviction, and in protecting the
2 community as a whole. Because Mr. Burchett has presented no valid civil rights
3 violation of his First Amendment right to free exercise actionable under § 1983, the court
4 finds it unnecessary to reach the merits of the other grounds for summary judgment
5 raised by the Defendants. Accordingly,

6 1. The Defendants' Motion for Summary Judgment is **GRANTED**.

7 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order, enter
8 judgment in favor of the Defendants dismissing the Complaint and the claims therein
9 with prejudice, close the case file, and furnish copies to counsel and the *pro se* Plaintiff.

10 **DATED** this 20th day of November, 2008.

11 s/ Justin L. Quackenbush
12 JUSTIN L. QUACKENBUSH
13 SENIOR UNITED STATES DISTRICT JUDGE
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